

What Makes Migration Control Morally Legitimate? **David A. Martin**

Over the years, a great many students have arrived in my Immigration Law class carrying a vague but durable sense that immigration control is morally dubious. They don't generally parade that attitude publicly, and may not have thought the matter through in careful moral or ethical terms. If asked directly about the validity of the governmental control enterprise, they will usually say that of course we shouldn't or can't move to open borders. But when our examination of various specific issues indicates a potential tension between immigration law enforcement and some other public good (such as local community policing), I encounter a heavy lean toward having federal enforcement yield so as to maximize the other value.¹ Maybe these students are not ready to declare for open borders, but enforcement of the immigration laws is sufficiently suspect that as a public policy value it ranks below just about every other objective.

In this paper, I want, first, to explore briefly some of the reasons for such starting-point intuitions, which are probably shared to some degree by many activists advocating for immigrants. I will look at both weak reasons and sound ones that carry significant moral weight. I will then examine three key arguments offered in defense of the moral legitimacy of immigration control, to evaluate their strengths and weaknesses, as well as the conditions they imply for controls to be morally acceptable. I conclude that there is a solid case for serious immigration controls, resting primarily on the political requirements for the sound functioning of democratic institutions (but partaking to some extent of each of the three arguments). And to make it clear, the case is for serious controls, for determined enforcement, but not for zero admissions or for controls lacking certain basic humanitarian features or for enforcement implemented free of a pragmatic sense of proportion. I will close with observations on the process of applying some of these conclusions to concrete policy issues.

I. Starting points

A. Deep tension with fundamental premises of liberal democracy

A core premise of modern liberal democracy is the equal moral worth of all human beings.² This does not mean that all persons must be treated equally, but it does require that adverse distinctions generally must be based on actions or decisions by the affected person, not on claims of their inherent inferiority³ – and certainly not on characteristics of the person that are

¹ To be clear, not all of my students enter with those priors. Others take what may be a more conventional starting point. They see it as simply a given that nations control borders, and that decisions about admissions criteria and enforcement measures are within the broad discretion of the receiving state's government – perhaps with few outer constraints.

² See Bruce Ackerman, *Social Justice in the Liberal State* xxx (1980); Joseph H. Carens, *The Ethics of Immigration* 225-54 (2013).

³ Ackerman at xx.

merely accidents of birth or over which he or she had no control. This notion of equal moral worth is the essential insight that powered the civil rights movement, and advocates sometimes now see resistance to immigration enforcement as the next arena of struggle for full realization of that value.

Modern law students, thankfully, are generally imbued with this egalitarian spirit (however imperfectly it may be realized in their polity or in their own personal lives), and they carry that orientation with them into the immigration law classroom. In the immigration control realm, we encounter a potentially glaring contradiction to the core equality principle. A highly consequential cluster of benefits, material and political, are tied very closely to a pure accident of birthplace. Economic opportunity, political stability, and an institutional structure protective of civil and political rights are generally available (albeit imperfectly) to those with full access to life in the United States or other wealthy democracies, but are much less reliable or available in many other countries. Citizenship, with its accompanying right to be admitted at any time within the borders of the country of nationality, is the crucial factor. But citizenship is overwhelmingly distributed at birth based only on location (*jus soli*) – or sometimes on bloodlines (*jus sanguinis*), which is an equally adventitious product of birth – rather than on choice or merit. Joseph Carens has been a persistent, thorough, and thoughtful proponent of this line of ethical criticism of immigration control – basing his powerful critique and his philosophical advocacy of an open borders policy squarely on the foundation of the liberal equality principle.⁴

In this critical view, migration control is simply a mechanism by which the winners in life's natural lottery of birthplaces or birth circumstances (a victory based not at all on their own merits or achievements) unjustly extend their advantages, to the distinct disadvantage of or harm to persons who fared much less favorably in that birthplace lottery, because they were born in Honduras or Sierra Leone or Somalia or Yemen. The only difference between the citizen, who can readily cross the imaginary and morally artificial line – the nation-state border – into the United States, and the member (citizen) of another nation-state who cannot, is the accident of birth. Rabindranath Tagore, Nobel Laureate poet, writing during the carnage of World War I, denounced nationalism – and by extension its primary institutional construct, the nation-state – as “organized selfishness.”⁵ That piercing condemnation remains an underlying theme in ongoing resistance to immigration enforcement, in a world marked by sharp disparities in wealth and in political stability. Rejecting selfishness is of course an important moral starting point, and I want to encourage that stance in my students. But we shall look more closely at the complex relationship between selfishness and the nation-state.

B. The ethical attractiveness of individual cases

A second reinforcing factor derives from the very nature of immigration enforcement actions. Though immigration control is often debated in large-scale abstract terms – “Build the

⁴ “In many ways, citizenship in Western democracies is the modern equivalent of feudal class privilege – an inherited status that greatly enhances one’s life chances.” Joseph H. Carens, *The Ethics of Immigration* 226 (2013) (from his Chapter titled “The Case for Open Borders”). This chapter elaborates on ideas Carens initially set forth in Carens, *Aliens and Citizens: The Case for Open Borders*, 49 *Review of Politics* 251 (1987).

⁵ Rabindranath Tagore, *Essays on Nationalism* xx (1917).

wall”; “Cut admission quotas by half”; “Expand the Border Patrol by 5000 officers” – it must be directly implemented case by case – individual by individual or family by family.

Some of this implementation, particularly in the grant or denial of visas at consulates located in foreign countries, can take place in a relatively quiet and minimally visible way. But enforcement at the border, and particularly in the interior of the country, is often visible and poignant. Most unauthorized migrants are neither violent nor scofflaws in the common understanding of the term (a common understanding that downplays the initial violation of the immigration laws through overstaying a temporary admission or sneaking across the border). They come to a wealthier country in order to work and to live frugally, not to commit criminal acts or to go on welfare.

Their presence in the workforce may modestly reduce wages of lower-skilled Americans – or at least retard wage increases, to the real benefit of the business owners who employ them. But their activity in the economy also generates new jobs, most of their employers withhold taxes from their paychecks, and resident migrants certainly pay sales tax and other public exactions. Objectively, the net impact of their presence may be modestly positive in the aggregate, or is, at worst, only modestly negative. A recent systematic study by the National Academies of Science⁶ concluded that the effect is positive for most residents, but carries some negative impact on the earnings of those citizens lacking a high school education.⁷ Some immigration advocates glide past this negative,⁸ or perhaps note that this uneven distribution of the gains could be redistributed through other public policy mechanisms. That is true in principle, of course, but rarely happens in practice – in the immigration arena or in other policy domains.

Beyond this, when a local community rallies to the support of a long-time resident picked up by ICE and placed into deportation proceedings, and the TV news and the other local media publicize the case, we are likely to encounter a host of other genuinely sympathetic factors.⁹ The media report that the person was a good neighbor and a hard worker, a contributor to the community and to his or her local church, and often (owing to America’s expansive birthright citizenship rules, anchored in the Constitution) the parent of U.S. citizen children. Hence the widely heard objection: deportation breaks up families. (In reality, we might note, deportation, particularly of fairly recent arrivals, often reunifies a family. Or to be more precise, the family relationships of migrants tend to be complex, with members in both the United States and the country of origin. Deportation quite often both sunders family relationships and restores others.)

When the policy focus shifts from broad numbers or structures to the kind of individual case often spotlighted in the media, then, enforcement can look like a sharply disproportionate and unnecessary exercise of selfishness, or a very crude way of trying to protect American

⁶ National Academies of Sciences, Engineering, and Medicine, *The Economic and Fiscal Consequences of Immigration* xxx (2017).

⁷ *Id.* at xx.

⁸ Cite advocacy organization news release on NAS study.

⁹ One should note that each side in this debate tends to pick its poster-child cases. Deportation opponents focus on long-resident workers with American-citizen family members. Proponents of a stricter immigration enforcement stance publicize immigration violators who have committed serious criminal offenses. Both sides have abundant pools of examples on which to draw.

citizens. In many such cases, the individuals targeted for deportation have already shown that they are productive and generally law abiding – and, compounding the sympathetic image, today 60 percent of the unauthorized residents in this country have lived here for more than 10 years.¹⁰ They are anchored in their current communities and schools and jobs. The thoughtful or sensitive student can understandably ask: What would it really hurt to let this particular individual or family remain in the United States?

C. Problematic assumptions about the intolerable quality of life in source countries

Another reason that I find fueling students' concerns about the moral validity of migration control and particularly of deportation rests on unexamined assumptions about what life is like in the country of origin, particularly whenever that country is in the developing world. There is a sense that it is exceptionally cruel to send people, at least after a few years of living in a well-to-do country, back to such a home country. This stance is often augmented by statements emphasizing particular and graphic problems in the country. I have heard invoked the exceptionally vicious violence employed by drug cartels in Mexico, for example, as a reason why return to Mexico is particularly heartless.

In most countries, however, even those having low GDP or ruled by authoritarian governments or beset by high levels of crime, there is still considerable space for normal quotidian life. Returning citizens find employment, resume farming, or maybe start a new business using money saved during their time abroad – or money already applied to the family business or farm after regular remittances carefully sent to family members back in the source country over the years. Work resumes, the children go to school, and the family finds a new range of life's rhythms. They may not be as comfortable as they were in the migration country, and their chances for advancement may not be as expansive. This is a genuine negative – but it does not mean that they are returning to intolerable suffering. And even if as migrants they developed a taste for life in a larger city, or acquired skills that will not find outlets in a rural village, they are of course under no obligation to return to the exact community of origin and can move to a city within the home country that may offer better opportunities.

Our public discussion of migration and return is far from doing justice to the complexity and variety of circumstances and outcomes. And in the process, advocates for undocumented immigrants sometimes unintentionally portray migrants caught up in enforcement proceedings as mere objects, buffeted by forces beyond their control, facing a virtually unlivable future in the source country, and without real hope unless their allies in America can find a way to keep them here. But the very history of their migration to the United States, for most of them, reveals resourcefulness, courage, and resilience – proof that they are self-activating subjects, not passive pawns. They have personal attributes and often social networks that they can draw upon to overcome the undeniable disappointment and disruption that removal represents, using in the country of origin the same skills and experience and doggedness that they employed while finding a foothold in the United States.

¹⁰Migration Policy Institute, Profile of the Unauthorized Population: United States, <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/US#yearsresidence>.

There are exceptions of course. Some are individualized: persons who do not have any family able to help them upon return, or who lack – or are inept at using – social networks there to help them find their way back into employment and community support. Other exceptions are specific to the country of origin. Some countries, such as today’s North Korea, have been so oppressive of all the citizenry (outside of the regime’s elites) that return is genuinely an appalling prospect. Other countries, such as Somalia or Yemen or South Sudan, are beset by violent conflict or so lacking in basic governmental functions (the so-called “failed states”) that genuine dangers exist for anyone returning. But these situations do not affect most persons facing removal from the wealthy democracies of North America or Europe.

D. The challenge

Nonetheless, even if we discount this third cluster of assumptions as a basis for critiquing the enterprise of migration control, the fundamental equality challenge remains. National borders, fortified by the expansive machinery of the migration control institutions, decree sharply different outcomes for persons based not on merit but on birthplace. Can such a result be morally justified?

II. Potential justifications for immigration controls

In my immigration law class, I want to get these moral issues out in the open and examine them carefully. For the relevant section of the course, I assign a lengthy reading from Joseph Carens posing the open borders challenge,¹¹ along with other readings that offer contrasting perspectives – including Michael Walzer’s chapter from *Spheres of Justice*, and Bruce Ackerman’s chapter on national membership in *Social Justice in the Liberal State*.¹² I begin that session by placing the students in a role play where they are, say, attorneys for the State Department or the Department of Homeland Security, involved in shaping and implementing policy and in defending government actions in the immigration realm. (I may ask some to assume the role of a regular defense attorney in immigration court – still a role that contributes to the ongoing functioning and normalization of the enforcement system.) I push them: How can you justify your participation in this enforcement machinery? Aren’t you, as Carens indicates, just perpetuating unjust privilege?

The early phases of the classroom conversation can be awkward. But before long participants begin offering tentative thoughts about justification, and then elaborating or qualifying their positions as others join in, working to flesh out or test the argument. Those offerings, like the more extensive arguments of most writers who venture into these questions, can be grouped under three broad headings.

A. Taking care of “our own”

A common early try is to suggest that we can’t adopt a full Carens because we have an obligation to address need by prioritizing care for “our own” – the poor or sick or less skilled

¹¹ Also, e.g. Kevin Johnson and Linda Bosniak.

¹² Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* 31-63 (1983); Ackerman, *supra*, at 89-95.

among our citizenry. This view acknowledges that there may be needy – and from many perspectives solidly deserving – applicants for admission from other countries. But because there are limits on any nation’s capacity to respond, it is appropriate to place our main resources and energies toward tending to the needs of fellow citizens. We can of course use the allocation of immigration opportunities to address *some* of the privation elsewhere on the planet (the United States does lead the globe in its level of permanent admissions – a million each year). And we can – and should – also work to alleviate need by sending resources or experts or even peacekeeping troops abroad instead of bringing people here. If another student objects that this stance leaves some people without anyone who will provide assistance and support, I sometimes hear this response: No, this vision of prioritized moral obligation toward the needy *does* contemplate someone with such primary responsibility. It falls on the fellow citizens of their own country. Of course, in many societies, largely owing to misrule or kleptocracy, those co-nationals who have the resources may fall far short of fulfilling this responsibility. But it would require an ambitious theory to posit that whenever the elites of one country fall short of addressing local needs, the full obligation to do so (via the nullification of valid immigration controls) is placed instead on those countries that have sustained an efficient economy and stable governmental institutions that generally honor human rights.

This “our own” response begins to develop classroom momentum, because it recognizes some level of moral obligation toward potential migrants, and yet it rests a (modestly) exclusionary result on a wider account of seriousness about addressing injustice or need. But it begs a rather insistent question from committed egalitarians: How are you defining those who fall within “our own”? The dividing line apparently remains essentially the boundary set by citizenship – that is, again, accidents of birth. To draw a line between our “own” and somebody else’s “own” is inescapably to depart from the principle of the equal moral worth of all human beings.¹³

A fair point, no doubt. But not necessarily fatal. Even committed egalitarians generally accept some notion of relational obligations – special, heightened obligations to certain other persons that derive from relationships rather than contract or agreement or explicit consent (which are subsets of choice or action or merit related to the individual beneficiary). The family is the clearest example. The notion that parents owe special obligations of care and support to their children could perhaps be explained to some extent on agreement – a non-express agreement to take on such duties that is implicit in the choice to have a child. But we generally also consider that sons and daughters have special obligations to parents in time of need (especially needs derived from aging) – obligations that exceed those of the parents’ neighbors or friends. This is true even though, as with the obligational network of citizenship, the offspring had no choice in the creation of that relationship. Similar obligations to siblings – and maybe to cousins or nephews or nieces, if the need is great enough – also can be invoked.

¹³ I certainly acknowledge the risk that these distinctions between our own and others can be perverted to form the basis for harsh dismissals of any worth in those who are not our own. Extreme versions of that attitude lead to racism and can also form the psychological foundation for atrocities. But I want to insist that the slope is not necessarily slippery. Moreover, the viewpoint explored in this section does not claim that *no* moral responsibility exists toward persons outside the “our own” circle – any more than sincere love of family precludes obligations toward neighbors. As developed below, there are decidedly benign and morally beneficial forms of special relational obligations.

To take the notion to a somewhat wider circle, egalitarians are not strangers to the concept of obligational communities.¹⁴ In the wake of a natural disaster, for example, one can reasonably say that members of the affected area have a special obligation to pitch in quickly with on-the-ground efforts of rescue and recovery, followed by debris clearance and community cleanup. It is not that all duties of aid or assistance fall on the local community members; there are other obligations that fall on the county or state, or indeed on the federal government. But we expect some kind of special engagement by neighbors when the need is high and amenable to direct personal action – expectations that do not apply in this way to persons living in distant locations.¹⁵ Acknowledging heightened obligations toward those who are part of this smaller-scale community may well depart from the rigorous impartiality imposed by the strongest readings of the equal moral worth principle. But as Tony Kronman has written, “although morality requires us to look at human affairs from the timeless standpoint of reason itself, its prescriptions must somehow be accommodated to the contingent and irrational features of the human condition.” Those features, he points out, include “the natural attributes that it is our accidental fate to possess.”¹⁶

Accepting the existence of special relational obligations, however, does not necessarily establish that such obligations apply on a level as vast as the unchosen community of the citizenry of a nation-state. Thus the “our own” rationale evokes a further critique. Special obligations among a family or neighbors, this line of argument suggests, derive from close and intimate contact, and generally from a history of mutual and reciprocal assistance. Special prioritized obligations may also exist within a club or even a neighborhood or small city – but again based on familiarity and direct or indirect contact on a manageable scale, as well as consent. Such is not possible for a nation-state.¹⁷

This sounds plausible. And yet feelings of national community do demonstrably exist, often calling forth, such as in the context of our all-volunteer military, considerable sacrifice in order to serve or protect or rescue fellow citizens. The notion that such feelings of special obligation can exist only in small face-to-face communities simply strikes me as empirically wrong.

But maybe it is more effective to come at this critique from the opposite direction, thinking about what institutions and attitudes can facilitate – or have facilitated – the engagement of individuals in helping wider circles of fellow humans. After all, as fallible humans, we are easily tempted to act selfishly or shortsightedly – or to take seriously only the needs or sufferings of those in close and visible proximity (if we harbor the instinct to help at all). So indulge me, for a moment, in a very crude history of the evolution of the reach of protective obligational networks.

¹⁴ Many years ago I ventured a more extended discussion of this notion in *Martin, Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 *U.Pitt. L.Rev.* 165, 193-204 (1983).

¹⁵ And even Joseph Carens acknowledges the force of special rights and obligations running between and among “[t]hose who choose to cooperate together in the state,” though he objects, based on the equal moral worth principle, to the exclusion of those who want to join the state and “sign the social contract.” That is, special obligations may exist, but basically all should have the ability to join the relational community. Carens, *supra*, at xx.

¹⁶ Anthony Kronman, *Talent Pooling*, in *XXII Nomos: Human Rights* 58, 76-77 (1981).

¹⁷ See generally Aleinikoff, 44 *U.Pitt.L. Rev.* 237.

In the paleolithic era, let me posit, feelings of compassion or special obligation were generally confined to families – perhaps modestly extended families including cousins and grandparents and the like – in an age when life, in Hobbes’s words, tended to be solitary, poor, nasty, brutish, and short. Over time, support and protection extended outward to larger clan networks, which could amass modestly greater resources and organize more sustained or sophisticated actions. Not all clan members were personally acquainted with one another, but often all such members were seen as family because of the assumption (often perpetuated inaccurately or through creative fiction) that the full clan was all descended from a common ancestor. If disaster befell a person, other clan members would rise to the occasion and assist him or his surviving family. If the person was harmed by an outsider, the clan would rally to exact systematic revenge on the other clan.¹⁸ In the feudal era, the circle of obligation and assistance then expanded to encompass shifting networks among wider fiefdoms and various levels of hierarchical overlords. And after the Treaty of Westphalia, the world is increasingly organized in nation-states. States have endured many varieties of rule and misrule, but the nation-state frames an institutional structure where it is at least possible on a far wider plane to sustain successful economies, to amass resources, to provide for protection, and to ameliorate hardship.

The most familiar and perhaps most completely developed examples of such societies are probably the European nations that follow an expansive welfare state model. But the argument developed here about the nation-state as an institution for sharing and protecting does not require a thick and bureaucratic safety net; it can coexist with thinner direct provision of social assistance by state institutions, particularly in a society that may be rich with other sources of aid, through private charity, community-based insurance schemes, or faith-based institutions. Also, part of what makes the nation-state an instrument for improved outcomes even for the least well-off is the possibility that its institutions reliably protect private property and enforce contractual obligations, so that commerce may thrive and maximize societal wealth – and also police against kleptocracy and skimming by corrupt officials. A modestly redistributive tax system is also important to help make sure that that societal bounty aids those on the lower rungs of the income ladder. In sum, the social safety net need not be thought of only in terms of direct cash transfers funded by the government.

The commitment to protection and amelioration is powered by what Walzer, following Henry Sidgwick, calls “patriotic sentiments,” wherein “communal cohesion makes for obligations and shared meanings” – meanings and obligations of moral significance.¹⁹ Such sentiments provide the necessary affective foundations for sharing or sacrifice, and so the primary protections and ameliorations apply to citizens – not (or not yet) to all inhabitants of the global village. But by helping to count a very broad circle of fellow humans as “our own,” the nation-state leads us to wider and probably more secure and enduring protections. In this vision, at least some level of serious and consistent migration control is needed in order to avoid overstressing the needed affective base (patriotic sentiment), and also to reduce the risk that demagogues can play on fears of the foreigner, of those who are not our own, in pursuit of their own power – and thereby undermine the functioning of democratic safeguards. (This observation relates closely to the second cluster of arguments for serious immigration control, to be explored below.)

¹⁸ See Henry Maine, *Ancient Law*, chapter 5.

¹⁹ Walzer *supra*, at 37-38.

Another way to put this point is to come back to my students' wish to overcome what they see as unjust outcomes deriving from the natural lottery of birthplaces. They focus on the unfairness in that poignant moment at the border when a person is turned away. But the natural lottery of birth assigns not only birth locations and citizenship. It also doles out – unevenly – a great many other traits and talents and ailments and disadvantages. It is not only the inequalities that result from at-birth distribution of citizenship that I, as a sympathetic egalitarian, would like to remedy or at least ameliorate. And I want to do it on a scale wider than just within my family or my neighborhood or village. In the current era, and probably for generations to come, the modern democratic nation-state is the most promising vehicle for doing so. Nation-states provide public schooling and progressive taxation. They sustain disability insurance and social security. They provide institutional stability in the form of courts and public safety officers, so as to protect economic investment and foster wealth expansion. They decree that new construction must be systematic in accommodating the disabled. And so forth.

Therefore, importantly, we need to recognize that the nation-state is not – or not only – “organized selfishness.” It also plays a significant role in *organized selflessness* (if that is not too inflated a label), marshalling resources and efficiently redistributing them to counteract many of the unfairnesses deriving from the natural lottery of traits and abilities and talents and intellect. It is therefore vital that we construct public policy, including migration policy, in a way that attends carefully to preserving these capacities of the nation-state. Insufficiently controlled migration threatens that kind of undermining. The next cluster of arguments supporting the moral legitimacy of immigration control delves more deeply into that claim: the need to protect democratic functioning.

B. The “technology of justice”: minimizing strains that undermine safety-net democracy

A second set of justifications for migration control looks hard at the political dimension, taking seriously the potential real-world challenges to democracy and to safety-net measures that derive from high levels of migration, with their attendant reactions. Bruce Ackerman, for example, finds a narrow (and stringent) justification for immigration limits in states committed to egalitarian liberalism, because we are, in his words, “far from achieving a perfect technology of justice”²⁰ – that is, a situation in which the democratic political process invariably has powerful shields against distortion and demagoguery.

Calls for more generous admission policies or the easing of controls by wealthy nations against unauthorized migration often treat the receiving polity as a black box. That polity is attractive to migrants because of its relative stability and wealth, its protection of rights and equality, and its range of employment opportunities. In this advocacy view, these attributes are just givens. The policy issue can then take a narrow focus: simply whether to allow more persons to enter or to remain. One need not attend to wider political impacts of the change, because it is simply assumed that the overall institutional structure, anchored in a history of effective governance, remains the same: a democracy with a reasonably functioning safety net (the organized selflessness discussed in the previous section).

²⁰ Bruce Ackerman, *Social Justice in the Liberal State* 93-95 (1980).

But the political reality is more complex. Expanding populations bring strains. When the expansion derives mainly from the addition of persons from other cultures and languages, the strains are magnified. In a democracy, those strains can ignite or feed political reactions. This has been a theme or worry in many philosophical explorations of the morality of immigration control, from Sidgwick through Ackerman, Walzer, Paul Collier,²¹ and others. In various formulations, they warn that at some point the friction from relatively uncontrolled migration will fuel right-wing or reactionary political movements, potentially resulting not only in authoritarian government but also significant new restrictions on future migration. These writers describe a classic instance of where the perfect (exceptionally generous migration openings fully true to the principle of equal moral worth) is the enemy of the good (maintaining reasonably high immigration levels in a context of law observance, control, and selection).

Back in the 1990s, this theme of democratic political vulnerability (or fragility) evoked a lot of skepticism from my immigration law class. The Soviet Union had just disbanded, and nations formerly in its bloc were launching new democracies and joining the European Union or the European Convention on Human Rights. Protesters erected a copy of the Statue of Liberty in Tiananmen Square. Wars were ending in Latin America, and military governments were yielding to electoral politics. The tide toward democracy, in Europe, Asia, and South America seemed powerful enough to absorb many blows. And in that environment, some student interlocutors treated these writer's warnings as a kind of embrace of the heckler's veto: Okay, some reactionaries are going to object to immigrants. Big deal. Instead of caving to them and cutting immigration way back, we just need courageous leadership to face them down.

Two reactions: First, the writers were not necessarily making a case for cutting migration drastically, but merely arguing the legitimacy of deliberate controls chosen and enforced by the receiving society, as a means of achieving reasonable limits and thereby minimizing political backlash. And second, the writers' stance generally presupposed a commitment on the part of political leaders to resisting calls toward radical retrenchment. But courageous democratic leadership, to be effective, still has to be alert to those concrete steps or background policies that nurture and sustain the support of enough followers to make the resistance successful.

If global trends ran strongly against the political fragility argument in the 1990s, the events of the last three years or so in Europe and North America now offer much more solid experiential support for the claim. They at least suggest that high levels of migration – or more precisely the perception of seemingly uncontrolled migration – does contribute toward dangerous strengthening of reactionary movements, in a way that can present real risks to rights-protecting liberal democracies.

The background setting during this period was dominated by heavy flows of asylum seekers to Europe, most dramatically by sea to Italy or Greece. A high percentage of the migrants were fleeing the brutal war in Syria, but the flow was also joined by asylum seekers from Afghanistan and Iraq, as well as sub-Saharan Africa and other source countries. According to UNHCR statistics, Mediterranean crossings by asylum seekers reached 219,000 in 2014, and then accelerated so that the same count in the first eight months of 2015 exceeded 310,000 –

²¹ Paul Collier, *Exodus: How Migration is Changing our World* xxx (2013).

200,000 to Greece and 110,000 to Italy.²² The drama of the dangerous sea passage and the suffering of the travelers received massive world coverage, including chilling photos of the lifeless body of three-year-old Aylan Kurdi at waterline on a Greek beach. On August 23, clearly moved by the humanitarian plight of the asylum seekers, Chancellor Angela Merkel and other European leaders announced that they would waive certain treaty restrictions that might have kept all these migrants in Greece and Italy, and would seek to rally support from throughout Europe to take extraordinary measures for the reception of these large new numbers in countries throughout the continent.

This was a noble and welcome humanitarian departure, but it quickly resulted in an even larger wave of migrants. The expanded volume exposed the failure of the governments involved to develop even rudimentary systems for efficient handling of the onward movement from the countries of first arrival. From late August 2015 through the end of that calendar year, Greece alone received 656,000 additional sea arrivals – who were then largely reduced to self-help to make their way north. The determination and the disorder of the migrating population were captured in startling photos showing thick columns of asylum seekers filling entire lanes of superhighways as they trudged north, day after day, toward distant towns where they hoped to catch a train to wealthy Germany or its neighbors.

Hard-right parties in many European countries had been gaining support for years by sounding immigration alarms. The rising flow in the fall of 2015 greatly boosted their efforts. The right-wing Law and Justice Party came to power in Polish elections in October 2015, and its Parliamentary majority began a steady campaign of weakening or dismantling democratic checks and balances (to the point that Poland was placed under EU sanctions in July 2017). And the new waves of migration were exploited by Viktor Orban’s increasingly authoritarian government in Hungary to tighten his grip (as his military strung razor wire along the borders where asylum seekers might venture on their way north). Polls showed considerable early strength for hard-right anti-immigrant parties in other countries facing upcoming elections, suggesting strong early chances to win control of the government in Austria and the Netherlands.

Although the welcoming policy adopted in August 2015 by European leaders responded to real humanitarian needs and had enjoyed varying degrees of domestic support, its open-ended nature triggered growing concern and opposition. Chaotic arrivals placed visible strains on receptive capacity and raised doubts about security screening at a time of deadly terrorist activity in France, Belgium, and other countries. Increasingly aware that European domestic politics were being poisoned by the perception of uncontrolled migration, EU leaders were moved to change policy. On March 18, 2016, they announced an EU agreement with Turkey, the primary starting point for most of the northbound Syrian refugee flow, which succeeded in sharply reducing the flow. Controversy persists over the terms of that agreement and its consistency with human rights and refugee treaties. But the new policy produced a highly visible impact on the numbers. Greece’s total of sea arrivals in 2016 fell to 173,000, still quite high but nearly

²² UNHCR Bureau for Europe, *Desperate Journeys: Refugees and migrants entering and crossing Europe via the Mediterranean and Western Balkans routes*, Feb. 2017, <http://www.unhcr.org/en-us/news/updates/2017/2/58b449f54/desperate-journeys-refugees-migrants-entering-crossing-europe-via-mediterranean.html?query=mediterranean%20crossings%202015>.

700,000 below the previous year's experience. The slowed traffic also enabled better management and reception.

This reassertion of stronger migration control appears to have had important political impact. The candidate for the anti-immigrant Freedom Party in Austria gained a strong plurality in the first round of Presidential elections in April 2016, but in May's runoff election between the two top vote-getters, he fell just short of victory, with 49.7 percent.²³ Immigration alarms also played a role in the Brexit referendum of June 2016. Though concerns in the United Kingdom were focused less on refugee flows and more on job competition from workers migrating from elsewhere in the EU, worries about unconstrained migration certainly contributed to the surprising and narrow win for the Leave faction. In the Netherlands, the party of the bitterly anti-immigrant and anti-Muslim leader Geert Wilders led in polls through most of the campaign leading up to parliamentary elections in March 2017. In the end, his party fell short of a majority, though it did gain five seats. (Wilders said that despite the outcome, "the genie will not go back into the bottle," and he bragged that his efforts had pushed many right-leaning parties to adopt tougher stances on immigration.²⁴) In France, Marine LePen's National Front party showed considerable strength in polling, highlighting alarms over immigration, and she became one of the two finalists in the Presidential vote May 2017. By that time the EU actions had abated the large-scale flow of migrants to Europe, and she ultimately lost to Emanuel Macron, who received 66 percent of the vote. This still marked the highest total of votes that a French far-right party had received in presidential elections.²⁵ In Germany, any backlash against the unruly flow that Merkel had helped to create with her August 2015 announcements was mitigated by the results of the March 2016 policy change and the resultant switch to more orderly and far smaller-scale refugee reception. Although Merkel's party did lose some ground in the September 2017 parliamentary elections, she will remain Chancellor. Meantime, however, a right-wing nationalist party gained a foothold in the Bundestag for the first time in 60 years, as the anti-immigrant AfD party won the third-highest party total, with 13.5 percent of the vote.²⁶

And perhaps the most immediately worrying outcome, based on actual electoral victories, came in the United States in November 2016. This happened even though, objectively, the U.S. system in recent years has not been subject to nearly the same magnitude of irregular arrivals nor to the same immigration strains as Europe. Indeed, the net unauthorized population in the United States has not grown for 10 years, and the average unauthorized flow across the southern border

²³ Many of the details and statistics in this account of European electoral races comes from Gregor Aisch, Adam Pearce, and Bryant Rousseau, How Far Is Europe Swinging to the Right?, N.Y. Times, updated March 20, 2017, https://www.nytimes.com/interactive/2016/05/22/world/europe/europe-right-wing-austria-hungary.html?_r=0. Austria's highest courts later voided those second-round results described in the text and decreed a new run-off. That time the Freedom Party candidate's support fell to 46.7 percent.

²⁴ Dutch election: Geert Wilders warns 'genie will not go back in the bottle', The Guardian, Mar. 15, 2017, <https://www.theguardian.com/world/2017/mar/15/dutch-pm-mark-rutte-boosted-by-spat-with-turkey-as-election-nears>.

²⁵ Angelique Chrisafis, Emmanuel Macron vows unity after winning French presidential election, The Guardian, May 8, 2017, <https://www.theguardian.com/world/2017/may/07/emmanuel-macron-wins-french-presidency-marine-le-pen>.

²⁶ Justin Huggler & James Rothwell, Far-right returns to German parliament for first time in 60 years as Angela Merkel wins 4th term, the Telegraph, Sept. 24, 2017, <http://www.telegraph.co.uk/news/2017/09/24/far-right-returns-german-parliament-first-time-60-years-angela/>.

for the last five years is at its lowest level since the 1970s.²⁷ But those scenes from the European superhighways played on Fox News as well as CNN and MSNBC in 2015 and 2016. And comprehensive immigration reform legislation, despite gaining 68 votes in the Senate in 2013, had never come up for a vote in the House. This failure left the field open for attack slogans disparaging what is widely called (but for highly disparate reasons) a failed immigration system. A surge of Central American asylum seekers in 2014 and 2016 provided a basis for more alarmism, and Donald Trump beat those drums expertly to expand and energize his base. His grossly distorted but electorally savvy claims about Democratic failures to assert effective control over migration certainly contributed to his shocking electoral victory. And in the wake of that victory, in the name of reasserting control, he has proposed dramatic retrenchments in immigration policy. Further, his victory significantly threatens the social safety net for citizens, and it also presages regressive public policy in dozens of other unrelated arenas.

The account above is not meant to claim that the immigration issue was decisive, either in powering the rise of right-wing candidates or in limiting their actual electoral successes once the EU took steps to reassert order and limits. But it does confirm the ongoing salience of immigration and the ways in which immigration control can at least feed demagoguery by those whose authoritarian tendencies portend far more damage to the liberal state than only in the immigration domain. It also suggests that the greatest vulnerability to demagoguery arises not from high numbers of immigrants per se, *but when facts on the ground can be portrayed as a loss of control over immigration.*

C. “*Communities of character*”

A third set of arguments for the legitimacy of immigration control that one finds in the literature usually achieves little traction in my classroom discussions. That is the argument for immigration control as a way to preserve cultural distinctiveness. Walzer writes:

The distinctiveness of cultures and groups depends upon closure and, without it, cannot be conceived as a stable feature of human life. . . . Admission and exclusion are at the core of communal independence. They suggest the deepest meaning of self-determination. Without them, there could not be *communities of character*, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life.²⁸

That sense of special commitment to all others within a self-identified community (those who share some special sense of their common life) is undoubtedly important, even indispensable. It is what powers relational obligations generally, and it is vital in governmental decisions to establish and sustain social safety nets (as discussed in part II.A. above).

Nonetheless, my students have generally shied away from this type of argument for immigration restrictions because they detect booby traps. First, it is not at all clear that closure is essential to cultural distinctiveness or to feelings of special commitment to other community

²⁷ See Elaine Kamarck, John Hudak, and Christine Stenglein, Immigration by the Numbers (Brookings Institution, Aug. 15, 2017), <https://www.brookings.edu/interactives/immigration-by-the-numbers/>.

²⁸ Michael Walzer, Spheres of Justice at xx, 62 (italics in original).

members. Joseph Carens effectively dissects Walzer's argument on this score, pointing out that different cities and regions within the United States have distinctive cultures, yet cannot exclude newcomers from other counties or states who wish to resettle there.²⁹ Moreover, feelings of special commitment to others within the local community are often manifest, finding their clearest active and even sacrificial expression in times of crisis – as happened in Houston during Hurricane Harvey.

Second, within the context of a fundamentally liberal political system, there is something discomfiting about collectively choosing and asserting the community's character in this way. According to at least some prominent theories, liberalism is largely a set of procedural commitments, leaving it to individual members to decide on their own substantive conception of the good and then to map out their own ways of actualizing that conception – so long as their quest does not interfere with a similar freedom for others. Cultural distinctiveness may well develop spontaneously, but it will derive mainly from substantive choices by free individuals. And it will not be static or frozen.

Third, the whole process of choosing communal character and enforcing it through exclusion calls to mind defenses offered long ago in support of racially restrictive covenants in property deeds, barring future sale of the residence to any person not of the Caucasian race. Without such requirements, the argument went, the community's character would be destroyed. In short, a community empowered to preserve its own chosen character could make some highly objectionable choices.

Walzer clearly understands these dangers, though he insists that the existing members must nonetheless be the ones who make the political choices about admissions policies:

To say that states have a right to act in certain areas is not to say that anything they do in those areas is right. One can argue about particular admission standards by appealing, for example, to the condition and character of the host country and to the shared understandings of those who are already members. Such arguments have to be judged morally and politically as well as factually.³⁰

This final insight – the space for ongoing moral argument about the exact shape of immigration controls – is the element I want to highlight and preserve from this third set of arguments based on communal character, as we now move into a sketch of certain practical applications of the moral legitimacy framework developed here.

III. Application of theory to policy

A. The chief justifications for immigration control: a recap

The underlying legitimacy of immigration controls, in my view, draws limited sustenance from the argument based on the character of the community. Deliberate, careful and measured controls, resolutely enforced through a procedurally regular system, are primarily justified by the

²⁹ Carens, 49 Rev. of Politics 266-xx.

³⁰ Walzer at 40.

argument from the political dimension – the recognition of democratic political vulnerability. A world of open borders would put too much strain on that special sense of commitment to other community members that is needed to foster and preserve democratic governance – and also to sustain a healthy social safety net effectively caring for “our own” (without wholly neglecting global needs).

The nation-state is, and will be for a long time, the primary institution for protecting order, facilitating commerce, protecting rights, and caring for the less fortunate. As Walzer has noted elsewhere, one cannot “simply proclaim a list of rights and then look around for armed men to enforce it.”³¹ We have to pay careful attention to institutional structures and what is necessary to sustain them. We have to place an appropriately high value on shaping other policies, specifically including immigration control policies, so as to foster, rather than undercut, the reassuring effectiveness of democratic governance.

B. Ongoing moral argument over specific policies

But once we accept that basic point, there is still abundant work to do to contest the shape of those migration controls, to shrink or expand admissions, to experiment and modify. The arguments above for the moral legitimacy of controls are by no means a call for control at all costs; they frame a plea for properly valuing and strengthening the benefits of migration control while still serving other important public objectives. Tradeoffs will remain important, but they have to be tradeoffs that do not consistently rank the need for adequate migration control at the bottom of the scale. An important moral guide in that process will be, as Walzer noted in the passage that ended Part II of this essay, the history of shared understandings about the character of our own liberal democracy, committed to equality though certainly imperfect in actualizing that commitment.

The decades-long struggle to end the national-origins quota system followed just this pattern. Opponents repeatedly appealed to principles of equality as manifested in our Constitution, our Declaration of Independence, and the proper understanding of the national character of this liberal republic.³² Repeal failed until the effort was bolstered, in the 1960s, by our society’s growing seriousness about ending racial segregation and enacting legal tools to enforce domestic equality. The act of limiting immigration could be justified; the shape of the limits previously in place, tethered to national origins, could not. Congress finally enshrined that conclusion in the Hart-Celler Act of 1965.

Similarly, the struggle against President Donald Trump’s ill-conceived proposals for immigration restrictions will need to engage such shared understandings. The character of this national community, it is quite fair to argue, is as a nation of immigrants. In a world of seven billion people, inexpensive travel, instant communication, and sophisticated terrorist threats, we are forced to honor that character in a far more measured and deliberate fashion than was appropriate to the nineteenth century. But what is not consistent with the character of this

³¹ Michael Walzer, *The Moral Standing of States*, 9 *Phil. & Pub. Aff.* 209, 226 (1980).

³² See my discussion of this history in Martin, *Why Immigration’s Plenary Power Doctrine Endures*, 68 *Okla.L.Rev.* 29, 54-55 (2015).

community is to cut legal admissions in half, at a time of prosperity, as the Trump-endorsed RAISE Act proposes to do.³³

Part of our national character is also to serve, as George Washington recognized,³⁴ as a haven for the persecuted. In the twenty-first century, this commitment still leaves us with hard decisions about limits and exact standards, but it does demand something far better than cutting overseas refugee resettlement to a record low 45,000 for 2018³⁵ – at a time when UNHCR reports the greatest global refugee protection challenges since the aftermath of World War II.³⁶

C. Assuring the reality and perception of reasonable control

Perhaps the central lesson from the political vulnerability argument, combined with the earlier historical sketch of immigration and politics over the last few years in Europe and the United States, is this: risk to democratic governance is greatest when significant segments of the voting population believe that large numbers of people are arriving and residing in a manner that is *outside the effective control* of the government. In that climate, more voters will favor simplistic responses that overreact, and they will be more receptive to the siren song of demagogic politicians.

The perception of loss of control is not a significant problem with legal, authorized immigration. Such people enter after regular decisions on their admissibility by government officers. (Unaddressed laxity or corruption in the legal admission screening process, however, could raise control concerns.) Unauthorized migration, in contrast, is almost by definition a central arena for alarmism – particularly in difficult economic times or in times when the flow is high (as it was from 1995 to 2007 in the United States).

Political asylum occupies a middle ground. It can lead to authorized residence, without invitation or advance screening (for good reasons rooted in the protective purposes of the refugee system). But the underappreciated difficulty of accurate adjudication leaves the asylum system vulnerable to false or marginal claims. Moreover, because asylum is in principle open to any foreign national who can achieve territorial presence, applicant numbers can grow rapidly in ways that are not easily subject to visible government management. In Europe the main challenge to a reliable perception of control derives from flows of asylum seekers. In the United States, the challenge has historically been from unauthorized migration, though in recent years

³³ See Trump endorses bill to halve legal immigration, Politico, Aug.2, 2017,

<http://www.politico.com/story/2017/08/02/trump-legal-immigration-reduction-bill-241249>.

³⁴ “The bosom of America is open to receive not only the opulent & respectable Stranger, but the oppressed & persecuted of all Nations & Religions.” George Washington, Address to the Members of the Volunteer Association and Other Inhabitants, Dec. 2, 1783, <http://teachingamericanhistory.org/library/document/address-to-the-members-of-the-volunteer-association/>.

³⁵ Julie Hirschfeld Davis & Miriam Jordan, Trump Plans 45,000 Limit on Refugees Admitted to U.S., N.Y. Times, Sept. 26, 2017, <https://www.nytimes.com/2017/09/26/us/politics/trump-plans-45000-limit-on-refugees-admitted-to-us.html>. Some factions within the Trump executive branch apparently favored a new annual ceiling as low as 12,000.

³⁶ See, Adrian Edwards, Forced displacement worldwide at its highest in decades (UNHCR, June 19, 2017), <http://www.unhcr.org/afr/news/stories/2017/6/5941561f4/forced-displacement-worldwide-its-highest-decades.html>.

the U.S. asylum system, now overwhelmed and understaffed in both DHS and the immigration courts, is also a flashpoint.

Serious and believable immigration controls, the kind that can help calm concerns and short-circuit overreaction, come primarily from being resolute about enforcing the law, even when there are sympathetic factors favoring the other side. This does not need to mean draconian rigidity; well-crafted and appropriately narrow humanitarian exceptions can be an important part of the picture.³⁷ But it means that, with regard to both proposed policy changes and decisions affecting individual cases, government actors must give substantial weight to system needs.

Such needs are abstract and diffuse, and it may seem heartless to push hard, for example, for the regular deportation of failed asylum seekers who came from troubled countries and who made good-faith claims, but were validly found not to meet the refugee definition. Recent events, however, have revealed a paradoxical necessity for such steps. Our failure to be serious about removal orders at the end of the asylum process over the last several years has contributed to the rocketing growth in new claims, many of them quite marginal, rendering the asylum system largely dysfunctional. Because the system cannot keep pace with claims, applicants routinely now receive work authorization, by law, after six months – though no one may have assessed by then whether the claim had any merit. In a pernicious feedback loop, this short road to work authorization stimulates still more opportunistic claims. Asylum applications filed with USCIS were at 27,000 in 2009 – a politically manageable level – and had been under 40,000 each year from 2004 through 2011. In about 2011, however, the decision system began to fall behind intake. From that point, a steeply rising trend line brought the number of new applications above 150,000 for 2017.³⁸

The Trump administration is now moving to reassert control, and the picture is deeply worrisome. Its new “Immigration Principles and Policies,” released on October 8, include calls to

³⁷In my experience, *flow* of migrants is far more important than *stock* in triggering popular concern and fueling exaggerated reaction. For example, the 2014 surge in Central American asylum seekers sparked severe reactions, including from the Obama administration, even though those numbers constituted less than one percent of the 11 million total stock of the unauthorized population – a level that had been present for years and had not impeded Senate passage of a wide legalization measure in 2013, a year of low flow. If this observation about stock and flow is correct, it implies that new steps toward better control should focus on recent arrivals and new violators. Such a focus sends a more powerful deterrent message to persons contemplating new irregular migration – that is, augmented flows. Another corollary is that a legalization program for the long-resident is not necessarily antithetical to a plan for more systematic control, as long as the forward-looking enforcement measures are serious and reasonably effective. In fact, legalization would be a strategically prudent step for those seeking improved enforcement. It would help widen the circle of popular support for certain stronger enforcement measures because they would be more clearly concentrated on newer arrivals with fewer ties to the United States. And a further prudential observation about the perils of the opposite stance: Starting your enforcement crackdown with a focus on the long-resident (as Attorney General Sessions seems to favor in his eagerness to deport Dreamers) is almost guaranteed to magnify resistance across the board, even to far more reasonable efforts to find and remove recent violators. I have developed some related themes elsewhere, including in Martin, *Resolute Enforcement is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 *U.Law & Politics* (2015); and Martin, *Illegal immigration challenges the rule of law, but Trump is making things worse*, *Vox: The Big Idea*, Sept. 15, 2017, <https://www.vox.com/the-big-idea/2017/9/15/16311592/illegal-immigration-rule-of-law-daca-sessions-arpaio>.

³⁸ Cite. All annual totals are by fiscal year.

narrow the asylum standards and increase punishments for falsehood.³⁹ They also suggest interest in detaining many more applicants throughout the asylum claim process, apparently as a way of deterring applications. These changes – particularly detention – would affect not only those with marginal claims, but also those who will eventually show that they meet the refugee definition. The existing system, in contrast, was originally designed to create a general deterrence message by focusing strong measures on those without meritorious claims – through securing *for them* a timely removal order *after* a full consideration of the merits. (Timeliness, of course, also has a more sunny byproduct; it promptly produces an asylum grant and attendant benefits in cases where the asylum officer or judge finds that the standards are met.)

Rather than narrowing protection standards and trying to deter applications by detaining applicants throughout the proceedings, it would be far better to enforce negative decisions resolutely after a full and fair hearing of the claim. But this is a nuance lost from sight when that 150,000 applications number – a fivefold increase in one decade – dominates executive (and to some extent public) attention and alarm. Years of placing a low priority on resourcing the asylum adjudication system and on acting resolutely to execute removal orders now bids fair to produce much harsher overall measures applied to asylum applicants.

IV. Conclusion

In sum, seemingly ungenerous steps, such as regular deportation of unsuccessful asylum seekers, will often be paradoxically necessary in order to achieve a steady-state system where generally humane features can endure.⁴⁰ It will of course remain difficult and contestable to decide exactly which strict steps are appropriate – and morally legitimate – in the service of those complex long-term objectives. But a frank recognition of the legitimacy of control, and of the need for a workable and reassuring enforcement system, is a key starting point.

³⁹ See David Nakamura, Trump administration releases hard-line immigration principles, threatening deal on ‘dreamers’, Wash. Post, Oct. 9, 2017, https://www.washingtonpost.com/news/post-politics/wp/2017/10/08/trump-administration-releases-hard-line-immigration-principles-threatening-deal-on-dreamers/?utm_term=.4cfb80ffcd74. The text of the Principles document can be found at <https://www.whitehouse.gov/the-press-office/2017/10/08/president-donald-j-trumps-letter-house-and-senate-leaders-immigration>.

⁴⁰ I develop this theme further in my essay titled “Resolute Enforcement is Not Just for Restrictionists,” *supra* note 37.